SUPREME COURT, U.S.
Supreme Court, U.S.
FILED
DEC 7 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-745

ANTHONY P. LAMORTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

ANTHONY P. LaMORTE,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioner Anthony P. LaMorte respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled cause on September 16, 1971 which judgment affirmed the judgment of conviction of the United States District Court for the District of New Jersey wherein petitioner was convicted of unlawfully interfering with interstate commerce by extortion and of conspiracy to do so all in violation of Title 18, United States Code, Section 1951, the Hobbs Act.

Citations to Opinions Below

There were certain pretrial motions in the within case which were adjudicated by the trial judge, the Honorable George H. Barlow, in an opinion reported in *United States* v. *Addonizio,* 313 F. Supp. 486 (D. N. J. 1970). The opinion of the United States Court of Appeals for the Third Circuit has not as yet been officially reported.[1]

Jurisdiction

The judgment of the Court of Appeals was entered on September 16, 1971 (Appendix A *infra,* P1a). A petition for rehearing with suggestion for rehearing en banc was denied by the Court on November 9, 1971 (Appendix B *infra,* P3a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented for Review

1. Whether the method of jury voir dire recommended in the American Bar Association's Standards Relating to Fair Trial and Free Press, Section 3.4(a) (Approved Draft, March 1968), which has been adopted by the United States Court of Appeals in the First Circuit, Second Circuit, and Ninth Circuit and which by the opinion of the Third Circuit in the case sub judice is now adopted in that circuit in all future cases, should not have been utilized, as requested by petitioners at trial, in the instant case, one which was enveloped by local, national and international publicity?

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[1] The Court of Appeals opinion is set forth in Appendix A of the Petition for Writ of Certiorai of the co-defendant Hugh Addonizio.

2. Whether petitioner in an indictment charging extortion under the Hobbs Act, 18 U.S.C. Section 1951, is entitled to a jury charge as to the distinction between the mutually exclusive crimes of bribery and extortion and an instruction that a finding of bribery cannot sustain the indictment?

3. Whether a severance was dictated in a conspiracy trial wherein the Government was permitted to read into evidence a transcript of grand jury testimony by a co-defendant, who did not testify at trial, wherein he admitted the commission of the crime?

Statutes Involved

The statutory provisions involved are Title 18 United States Code, Sections 371 and 1951. They are printed in Appendix C, *infra* P5a.

Statement of the Case

Petitioner Anthony LaMorte, then Director of Public Works for the City of Newark, New Jersey, and four other defendants, Hugh J. Addonizio, then Mayor of Newark, Joseph Biancone, Ralph Vicaro, and Philip Gordon, (then corporation counsel of Newark), were found guilty following a jury trial of unlawfully interfering with interstate commerce by extortion and of conspiracy to do so all in violation of 18 U.S.C. §1951, the Hobbs Act. The indictment in this matter reads in 66 counts and charges each of the 15 defendants with 1 count of alleged conspiracy and each with 65 counts alleging substantive acts in furtherance of said conspiracy. Of the 15 defendants, two died before the commencement of the trial (Mario Gallo and Anthony Giuliano), five were severed prior to

trial (Benjamin Krusch, Frank Addonizio, Lee Bernstein, Calvin West, and Irvin Turner), two were severed during trial due to illness (Ruggiero Boiardo, Jr. and Norman Schiff), and one (James Callahan) pleaded guilty during the course of the trial to the crime of filing a false tax return in violation of 26 U.S.C. §7206(1) and was thereafter severed from this matter (3008a; 3011a).[2]

The trial court, prior to submitting the case to the jury, struck from the indictment the last two counts which charged substantive crimes of extortion. As noted, the remaining five defendants were each found guilty of the conspiracy count and 63 substantive counts of extortion. LaMorte was sentenced to 10 years imprisonment and fined $10,000.00, Mayor Addonizio and Biancone received like custodial sentences and were fined $25,000.00. Vicaro was sentenced to 12 years imprisonment and fined $10,000.00. Gordon was sentenced at a later date to 3 years imprisonment.

LaMorte appealed the judgment of conviction to the United States Court of Appeals for the Third Circuit and his appeal was consolidated with those of Mayor Addonizio, Biancone and Vicaro. Following the argument of the appeals and prior to their adjudication, the senior member of the panel the Honorable Abraham L. Freedman died. On September 16, 1971, seven months after the arguments, the two judge panel affirmed the convictions. Gordon's appeal was argued before another panel in the Third Circuit and his conviction was affirmed on September 24, 1971. A Petition for Rehearing with sug-

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[2] "a" refers to the printed joint appendix of defendants in the Court of Appeals, which appendix has been certified and filed with this and so-defendants' petitions as part of the official record below.

gestion for rehearing en banc was denied by the Court on November 9, 1971. Petitioner is presently at liberty on bail.

There will here follow a brief review of the history of this matter including the testimony at trial which is necessitated by the nature of the legal arguments which follow.

The alleged extortion payments to which the indictment refers involves in the main two major Newark projects—the Southside Interceptor Sewer System (Southside), and the Southerly Extension of Newark's water supply system (Southerly Extension). The evidence presented by the government was designed to convey to the jury one dominant theme, namely, that everyone connected with these two projects, whether contractors, suppliers and engineers, would have to pay a percentage or kickback. In order to prove this the government produced various witnesses and attempted to show that either a kickback was paid or the city contract was not awarded. Those who were awarded contracts testified that they continued to kickback sums of money for fear of future economic reprisal—that Newark would not pay their bills. While conceding that the testimony presented a factual issue of extortion it is clear also that the very same testimony could have been interpreted as involving bribes by those contractors, suppliers and engineers to obtain the contracts.

The contractor who was awarded the Southside project was C. Salvatore & Sons Inc., who immediately entered into a joint venture with three other contractors (who all qualified as bidders on the project). The government's theory was that close to one million dollars was extorted from this joint venture. The testimony however showed that several months before the contract was awarded one

John Sepede, an engineer, wanted to gather a series of contractors for the purpose of forming a joint venture for a $10 to $12 million job for which a million dollars in payoffs would be required. The purpose of the joint venture was to avoid competitive bidding. (Of the nine qualified bidders on the project only three submitted bids). The engineers on the project were to be Sepede and one Charles Capen who were to pay a percentage of their fee in return for the contracts. Sepede died and one Paul Rigo replaced him in the partnership with Capen. The alleged extortion payments by this engineering firm (which also received the Southerly Extension contract) make up 63 of the 64 counts of the indictment.

One supplier, International Pipe and Ceramic Company (Interpace) chose not to bid on the Southside project following an alleged extortion demand of 10% of the contract price. Notwithstanding this experience Interpace chose to accept a contract on the Southerly Extension project the following year after *negotiating* a 5% payment.

Verona Construction Company, a qualified general contractor bidder on the Southside project chose not to submit a bid. Its principal, one Ralph Cestone, was personally advised by Sepede of the plans for the joint venture. Cestone, like Interpace, chose to go after and received the Southerly Extension job and thereafter allegedly made certain payments which he stated represented the "price" of the contract.

Paul Rigo, who as noted together with Charles Capen, was the engineer on both projects, testified from certain diaries as to various payments made by him to the defendants. Each of these payments was incorporated in a separate count of the indictment and constituted the last

63 counts of the indictment. The Government in order to buttress the credibility of its star witness read into evidence, over objection, certain grand jury testimony of the defendant Gordon, who was also on trial, wherein he admitted receiving monies on two occasions from Rigo.

Reasons for Granting the Writ

(a) As heretofore noted, one of the defendants in this matter (Hugh Addonizio) was the Mayor of Newark, the largest city in New Jersey. Thus, his alleged criminal involvement in this matter precipitated extensive local, national and international publicity of every form both in the period prior to indictment and arrest and the subsequent period leading up to and during the trial (the jury was, of course, sequestered during trial). The publicity commenced as early as the summer of 1968, when Addonizio was first subpoenaed to testify before the county grand jury (he appeared on five different times.) In December, 1969 Addonizio was subpoenaed to testify before the federal grand jury. One week later the grand jury returned the 66 count indictment in this matter. On January 6, 1970 the now notorious "DeCarlo tapes" were released (6718a-6719a; 6728a; 6730a-6731a). There were numerous references to the Mayor in those tapes. The trial in this matter commenced on June 2, 1970 in the midst of Addonizio's reelection campaign which, of course, engendered considerable additional publicity to the case.

In support of the pretrial motions for a continuance and change of venue eight volumes of newspaper clippings were submitted. (The volumes form part of the record). An example of the type of prejudicial publicity which enveloped this case, which among other things linked various defendants to the Mafia, (6650a) and Or-

ganized Crime (6648a), is seen in pages 6621a to 6786a of the appendix on appeal. Some of the publicity emanated directly from the prosecuting U. S. Attorney in the case (6632a).

The trial court, as it had to, recognized that the pretrial publicity was "extensive and intensive". *United States v. Addonizio*, 313 F. Supp. 486, 493 (D. N. J. 1970). It however refused to grant a continuance, stating that a "properly conducted voir dire will adequately protect the rights of these defendants to a fair trial." *Supra*, at p. 494. The Court did state: "If the voir dire disproves this asumption, the relief requested could then be reconsidered." *Supra*, at p. 494.

As a result of the trial court's refusal to grant a continuance, the trial in this matter commenced a little over 3 months after indictment and amid extensive local, national and international publicity. Additionally, and contrary to its earlier promise to undertake a properly conducted voir dire, the court proceeded to undertake the jury selection with unusual dispatch and in the course of which failed to properly elicit what influence the pretrial publicity had upon the prospective jurors. An examination of the trial record shows that general and often innocuous questions were asked of the jury panel, which questions failed to elicit anything except the anticipated noncommital responsives. There was a complete failure to ascertain the extent of the individual juror's exposure to pretrial publicity and what effect, if any, it had upon him. By its failure to permit an individual and sequestered voir dire, conducted by both the court and counsel, the trial court accomplished only what it set out to do—pick a jury in the shortest possible time. Of the 103 jurors called over a three day period, 76 indicated exposure to pretrial publicity and 21 were excused prior to

any voir dire on this question. Only six indicated that they had no pretrial publicity exposure. Two of the six served on the jury which rendered the verdict.

Of the 12 members of the jury deciding the case four admittedly read articles about the case (Lyle Cook, 678a; 680a; Raymond Moats, 741a-743a; Victor Dankanics, 744a-747a; and Jennie Zaleski, 890a-895a) and five others had read headlines or recalled skimming articles. The extent of the exposure to publicity, which included press conjecture of a Mafia tie among the defendants, and the effect of such publicity upon these jurors will never be known. The obvious vice of a general voir dire in a case of this dimension is readily apparent even when a juror is forthright enough to admit in front of others that he or she has formed an opinion on the question of guilt or innocence as a result of what has been read or heard in the press (941a). The prejudicial effect of such an opinion in the presence of other prospective jurors is evident.

An examination of the inadequate voir dire conducted by the trial judge clearly requires a reversal of the judgment. The late Judge Freedman, at the time of the oral arguments in the Third Circuit which were tape recorded, clearly made known his feeling that the questions propounded by the trial judge were too general, and not sufficiently probative.

Petitioner LaMorte submits that the opinion of the appellate court below on the issue of the jury voir dire is erroneous in law as well as inconsistent in result. At the trial and on appeal LaMorte had urged that the standards set forth in the American Bar Association's Standards Relating to Fair Trial and Free Press, §3.4(a) (Ap-

proved Draft, March 1968) be adopted. The ABA proposal recognizes the ineffectiveness of a general as opposed to sequestered voir dire, and determined the need to ascertain not only the juror's "state of mind" but also the "nature and degree of his exposure" to pretrial publicity. The appellate tribunal recognized that this was not accomplished in the case at bar. The panel recognized that the ABA proposal is a sound one and in the opinion recommends its adoption in the future where the case warrants. (Thus adopting the views expressed in the First Circuit, *Patriarca* v. *United States*, 402 F. 2d 314 (1 Cir. 1968), cert. den. 393 U. S. 1022 (1969); Second Circuit, *United States* v. *Trupiano*, 418 F. 2d 1069 (2 Cir. 1969), cert. den. 397 U. S. 1021 (1970); and Ninth Circuit, *Silverthorne* v. *United States*, 400 F. 2d 627 (9 Cir. 1968)). LaMorte asks why he was not entitled to these ABA safeguards. It is no answer to merely seek to distinguish the case at bar (and improperly so) from such cases as *Irvin* v. *Dowd*, 366 U. S. 717 (1961); *United States ex rel. Bloeth* v. *Denno*, 313 F. 2d 364 (2 Cir. 1963); and *Silverthorne* v. *United States; supra.* In reality, the world-wide publicity which the "Addonizio case", as it is commonly referred to, engendered is the true distinguishing feature which the two member appellate court refused to acknowledge.

It is no cure to the prejudice suffered by LaMorte to direct the application of the ABA recommendation to all future cases. The new trial which LaMorte seeks should be determined on the merits of this issue alone without regard to the evidence at trial. Whether or not there was sufficient evidence presented to convict is of no moment, and should not serve as a smokescreen on this issue. Unfortunately it appears that the panel may have permitted the evidence and its view thereon to interfere.

Its *in futuro* ruling with respect to the ABA proposal can receive no other interpretation.[3]

(b) It is clear that the definition of extortion in the Hobbs Act was derived directly from the New York Statutory Law in existence in 1948 when the Act was enacted. (Compare 18 U.S.C. §1951 with Penal Law of 1909 Art. 80, Sec. 850 (McKinney's Consol. Laws)). See also, *United States* v. *Nedley*, 255 F. 2d 350, 355 (3 Cir. 1955). An examination of New York decisional law shows also that the crimes of extortion and bribery were considered to be mutually exclusive prior to 1965. (Compare Art. 80, Sec. 850 (extortion) with Art. 34, Secs. 370-382 (bribery) in the New York Penal Law of 1909). See also *People* v. *Dioguardi*, 203 N. Y. S. 2d 870 (Ct. App. 1960); *People* v. *Feld*, 28 N. Y. S. 2d 796 (Sup. Ct. 1941). The New York decisions differentiated between extortion and bribery depending upon whether the facts showed a voluntary or involuntary payment. See *Hornstein* v. *Paramount Pictures*, 37 N. Y. S. 2d 404, 413 (Sup. Ct. 1942), aff'd 41 N. Y. S. 2d 210 (App. Div. 1943), aff'd 55 N. E. 2d 740 (Ct. App. 1944).

LaMorte contended at the trial that he was entitled to a charge to the jury clearly enumerating and explaining the legal differences between extortion and bribery so that

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[3] It should be noted that the Government would in no way be prejudiced by the direction of a new trial. As noted seven defendants in the indictment are still awaiting trial. Moreover, one of the Government's key witnesses Irving Kantor, who testified that his bank account was the mechanism by which money flowed from the joint venture on the Southside project to defendants Boiardo and Biancone and through whom checks and invoices were introduced, is still alive notwithstanding his illness which necessitated the taking of trial testimony from his hospital bed (1232a-1236a).

the jury could render an intelligent decision. The testimony at trial, which has heretofore been summarized, supports this request. The United States Attorney aware of this issue, spent considerable time in his summation in an attempt to persuade the jury that the evidence dispelled bribery (5621a-5630a; 5683a). The trial court however did not charge as requested and in the course of its protracted charge made the following singular reference:

> "The mere voluntary payment of money, accompanied by any economic loss, would not constitute extortion." (5749a-5750a)

No reference to the defense of bribery was made; no reference to the word bribery or a definition was given. LaMorte argued that this omission constituted reversible error.

The appellate court below accepted LaMorte's argument for the most part. It agreed that the Hobbs Act definition of extortion came directly from the then existing New York law; it impliedly agreed that the proofs indicated a factual issue as to whether there was extortion or bribery (See *United States* v. *Kubacki*, 237 F. Supp. 638 (E. D. Pa. 1965)); but it erroneously concluded that the jury was adequately instructed with respect to these mutual exclusive crimes. The panel concluded that:

> "Although the court did not mention the word 'bribery' in its charge, it adequately set forth the characteristics distinguishing bribery from extortion. There was no need to instruct in detail as to an offense for which the defendants were not on trial."

Conceding that there was a failure to instruct in detail, the one mention in the charge heretofore set forth

cannot even be characterized as cursory. A realistic appraisal requires the conclusion that the charge took the issue of extortion or bribery right out of the case.

(c) The defendant Gordon's grand jury testimony necessitated a severance under *Bruton* v. *United States*, 391 U. S. 123 (1968). The government's principal witness Rigo was subjected to several days of vigorous cross-examination in an attempt to effect his credibility. Cross examination elicited that Rigo had at various times (1) misrepresented to people, including officers of the State of New Jersey, that he had an engineering degree (2585a; 3389a); falsified business documents to avoid tax-payments (2797a-2798a; 2828a); violated his profession's code of ethics (3595a); submitted padded bills to the City of Newark (3022a); cheated his partners (3950a); and lied under oath to a grand jury (3025a). Rigo testified as to the various payments which he made (Counts II to LXIV of the Indictment) and as to the conspiracy which formed the first count of the Indictment.

In an effort to lend credibility to Rigo's testimony the Government read into evidence Gordon's grand jury testimony wherein he admitted receiving two payments of money from Rigo. The trial judge gave a limiting instruction to the jury with respect thereto (as in *Bruton*).

The appellate panel misconstrued the gist of LaMorte's argument on appeal that such limiting instruction is meaningless in a conspiracy case. The panel simply rejected the argument by stating that the Gordon testimony in no way implicated LaMorte and the other defendants.

While the Gordon grand jury testimony did not directly implicate LaMorte, it was clearly offered to buttress the testimony of the prosecution's key witness Rigo by confirming his testimony that payments were made to Gordon

and Giuliano. The limiting instruction to the jury is clearly "ineffective" as the jury was eventually called upon to decide whether a conspiracy among *all* defendants existed and whether Rigo's testimony of other payments was to be believed. It would require naivete to believe that the jury was able to disassociate the Gordon testimony from these issues. This position is buttressed on an examination of the Government's opening and the context in which this testimony is referred to:

> "We shall prove beyond a reasonable doubt each allegation of payments as set forth in the indictment. We shall prove that the defendant Gordon before a United States Grand Jury admitted under oath that he did get cash from Rigo for himself and that he did pass along to Giuliano the payments which he received from Rigo for Giuliano.
>
> We shall prove to you that *each of the payments made to the individual defendants was received by that defendant pursuant to the conspiracy* as I have outlined it, with the defendants not obtaining on behalf of themselves alone, but also on behalf of the other defendants in the conspiracy." (1163a-1164a)

And in summation, when during the course of reference to the Gordon grand jury testimony, the prosecution stated:

> "The Judge will tell you that where people act in concert, common purpose, common design, common understanding, that is the hallmark of a conspiracy." (5693a)

It is clear that when a jury is charged general principles referable to the law of conspiracy, which they are called

upon to apply in deciding whether a conspiracy exists, a limiting instruction with respect to the Gordon testimony is of no moment and becomes a "futile" gesture.

The prejudice of the Gordon testimony in the instant case is obvious. See *A. B. A., Standards, Joinder & Severance,* §2.3, pp. 34-43 (1968). In *Developments in the Law, Criminal Conspiracy,* 72 Harv. L. Rev. 920 (1959), the author, referring to the problem here under discussion, states:

> "However, the admonition (to the jury) has been characterized as 'ritualistic' and many courts recognize that it is impossible for a juror completely to disregard evidence he has heard." (*Supra,* at p. 990)

The requested severance should have been granted. It is interesting to note that the severance has now finally been accomplished—but unfortunately at the appellate and not the trial level.

(d) Petitioner LaMorte adopts by reference herein all arguments advanced by Hugh Addonizio, Joseph Biancone and Ralph Vicaro in their Petitions.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PETER S. VALENTINE
Attorney for Petitioner

APPENDIX A

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,295

No. 19,391

No. 19,392

No. 19,393

UNITED STATES OF AMERICA,

v.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LAMORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILLIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER,

RALPH VICARO, Appellant in No. 19,295,
HUGH J. ADDONIZIO, Appellant in No. 19,391,
ANTHONY P. LAMORTE, Appellant in No. 19,392,
JOSEPH BIANCONE, Appellant in No. 19,393.

(D. C. Criminal No. 548-69)

Appendix A

On Appeals from the United States District Court for the District of New Jersey

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Present:

Seitz, *Chief Judge* and Freedman* and Rosenn, *Circuit Judges*

Judgment

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed September 23, 1970, be, and the same are hereby affirmed.

Attest:

Thomas P. Quinn
Clerk

September 16, 1971

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* Judge Freedman participated in the consideration of these cases, but died before any disposition was made.

APPENDIX B

Decision on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,295

No. 19,391

No. 19,392

No. 19,393

UNITED STATES OF AMERICA,

v.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LAMORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER,

RALPH VICARO, Appellant in No. 19,295.
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ANTHONY P. LAMORTE, Appellant in No. 19,392.
JOSEPH BIANCONE, Appellant in No. 19,393.

SUR PETITIONS FOR REHEARING

Appendix B

Present:

COLLINS J. SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, and ROSENN, *Circuit Judges*

The petitions for rehearing filed by Ralph Vicaro, Hugh J. Addonizio, Anthony P. LaMorte, and Joseph Biancone in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court,

MAX ROSENN
Judge

Dated: November 9, 1971

APPENDIX C

Statutory Provisions Cited

18 U.S.C. Section 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned for more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. Section 1951

Interference with commerce by threats or violence

The pertinent portions of §1951 read as follows:

> "(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be

fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

• • •

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Nos. 71-744, 71-745, 71-754 and 71-756

In the Supreme Court of the United States

OCTOBER TERM, 1971

HUGH J. ADDONIZIO, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY P. LAMORTE, PETITIONER

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v.

UNITED STATES OF AMERICA

JOSEPH BIANCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ANTHONY P. LAMORTE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-754

RALPH VICARO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-756

JOSEPH BIANCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of New Jersey, petitioners and one Gordon[1] were convicted on sixty-three counts charging obstruction of commerce in violation of the Hobbs Act, 18 U.S.C. 1951, and one count of conspiring to commit that offense. Petitioners Addonizio and Biancone were sentenced to ten years' imprisonment and a $25,000 fine; petitioner LaMorte was sentenced to ten years' imprisonment and a $10,000 fine; and petitioner Vicaro was sentenced to 12 years' imprisonment and a $10,000 fine. The court of appeals affirmed in an exhaustive opinion (see Pet. in No. 71-744 (Addonizio) App. A 1-50).

The evidence is set forth in full in the opinion of the court of appeals. It shows that between 1964 and 1969 in Newark, New Jersey, contractors engaged in two large scale construction projects for the city of Newark were required to pay kickbacks of ten percent of the payments received from the city. This money went to the Mayor (petitioner Addonizio) and members of the city government (including petitioner LaMorte). Petitioners Biancone and Vicaro were directly involved in extracting cash from the contractors.

1. Each petitioner contends that the trial court erred in refusing a defense request to instruct upon the differences between bribery and extortion, the former not being included in the prohibition of Section 1951. The court refused this instruction but did instruct that the extortionate conduct required under

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[1] Gordon has already filed a petition for a writ of certiorari, No. 71-626, this Term, to which we have filed a response.

18 U.S.C. 1951 did not encompass mere voluntary payments by the victim unaccompanied by any fear of economic loss (Pet. No. 71-744, App. A 49). This was sufficient under the evidence which showed that payments were made in response to extortionate demands (Pet. No. 71-744, App. A 41). At all events, the trial court's instruction adequately informed the jury that involuntariness of the payments was an essential element of the crime.

2. Petitioners LaMorte and Addonizio contend that the *voir dire* in the instant case was incorrectly conducted, because the prospective jurors were not questioned out of the presence of other jurors as to the possible prejudicial effect of pretrial publicity. This contention is dealt with fully by the court below (Pet. No. 71-744, App. A 25-29) and we rely upon its analysis and conclusion rejecting this claim. Petitioner Addonizio's additional arguments regarding the Confrontation Clause and his motion for severance are similarly discussed and properly rejected in the opinion below (see Pet. No. 71-744, App. A 35-37, 19-21). We note further that other recent cases support the position of the court below that, absent a showing of "real prejudice"—which is absent here—a defendant has no right to a severance in order that he may comment on the failure of his co-defendants to take the stand. *United States* v. *Caci*, 401 F. 2d 664, 671-672 (C.A. 2), and cases there cited, certiorari denied, 394 U.S. 917; *United States* v. *De La Cruz Bellinger*, 422 F. 2d 723, 726-727 (C.A. 9), certiorari denied, 398 U.S. 942; see also

United States v. *Rivera* (C.A. 2), petition for a writ of certiorari pending, No. 71-668, this Term.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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